Supreme Court, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

FLUOR CORPORATION and Affiliates,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Stanford G. Ross
Counsel of Record
James P. Joseph
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioner

8 pp

QUESTION PRESENTED

Whether the Supreme Court's decisions in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561 (1950) (interpreting the Internal Revenue Code of 1939), and *United States* v. *Koppers Co.*, 348 U.S. 254 (1955) (interpreting the Excess Profits Tax Act of 1940) can be construed to create common law and equitable principles that require that deficiency interest be imposed under section 6601(a) of the Internal Revenue Codes of 1954 and 1986, notwithstanding Congress' express provision in section 904(c) of those Codes that foreign taxes are "deemed paid or accrued" in the year to which such taxes are carried back and thereby eliminate any deficiency for such prior year?

PARTIES TO THE PROCEEDING

All the parties are named in the caption.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Fluor Corporation and Affiliates respectfully petition for a writ of certiorari to review the judgment and opinion issued by the court below.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 126 F.3d 1397 and is set forth in its entirety in the Appendix at A-2 to 22. (All "A-_" references are to pages of the Appendix.) The opinion of the United States Court of Federal Claims, reversed by the Federal Circuit, is reported as *Fluor Corporation* v. *United States*, 35 Fed. Cl. 520 (1996) and is set forth in the Appendix at A-23 to 37.

JURISDICTION

The decision below was originally issued by the Federal Circuit on August 19, 1997. Taxpayer petitioned for a rehearing with a suggestion for rehearing en banc. On September 19, 1997, the Federal Circuit requested the government to file a response. On October 17, 1997, the Federal Circuit ordered that the rehearing be granted for the limited purpose of modifying the court's opinion and ordered the previous opinion be withdrawn. (A-1.) Also, on October 17, 1997, an amended opinion was issued and judgment was entered on that date. In accordance with 28 U.S.C. § 2101(c), this Petition is filed within ninety days of the date judgment was entered. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Internal Revenue Code of 1954 (26 U.S.C.), as amended and in effect during the years in issue (hereinafter referred to as the "Code") are set forth in the Appendix at A-38 to 43. In 1986, the Internal Revenue Code of 1954 was redesignated the Internal Revenue Code of 1986. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085. The relevant provisions were unchanged from the 1954 Code, as amended and in effect during the years in issue, until 1997. In 1997, in the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, section 1055, 111 Stat. 778, enacted new Section 6601(d)(2), effective with respect to foreign tax carrybacks "arising in taxable years beginning after the date of the enactment of this Act" (August 5, 1997), as set forth in the Appendix at A-42-43.

STATEMENT OF THE CASE

The issue in this case is whether the taxpayer is required by the Internal Revenue Code to pay interest under section 6601(a) on an underpayment of tax for 1982 that was eliminated by a carryback of foreign taxes.[1] The United States Court of Federal Claims ("Claims Court") held in favor of the taxpayer based on the "plain language of the statute," stating that "[t]he intent of Congress can be discerned from the plain language of the statute. Congress provided in § 904(c) that the carryback of the credit for excess foreign tax paid 'shall be deemed taxes paid or accrued' in the earlier year." (A-36.) Pursuant to section 904(c), the taxpayer's tax obligation for 1982 was eliminated by excess foreign taxes that were carried back and "deemed" accrued in 1982, thereby also eliminating any interest under section 6601(a).

Upon appeal by the Government, the United States Court of Appeals for the Federal Circuit held that foreign taxes that were deemed to be accrued in an earlier year under section 904(c) did not affect the obligation of the taxpayer to pay interest under section 6601(a) on the tax deficiency that was eliminated, thereby reversing the Claims Court decision in favor of the taxpayer. The Court stated that its decision was based on "the principles announced in two closely analogous decisions of the Supreme Court [*Seeley* and *Koppers*] and from the statutory context in which this issue arose." (A-5.)[2]

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the years at issue.

[2] The United States Court of Appeals for the Federal Circuit acquired jurisdiction of this case under 28 U.S.C. § 1295(a)(3), which confers on that Court exclusive jurisdiction over an appeal from a final decision of the Claims Court. The Claims Court acquired jurisdiction of this case under 28 U.S.C. § 1491.

As a matter of law, the applicable statutory provisions in the instant case are clear and unambiguous. In 1954, in codifying the *Seeley* case, Congress provided unambiguous statutory language to impose deficiency interest where a tax liability was eliminated by a net operating loss carryback. It expressly provided in section 6601(d) (then section 6601(e)) that, for purposes of section 6601(a), a net operating loss carryback shall not affect the computation of interest under this section for the period ending with the end of the taxable year in which the net operating loss arose.

The taxpayer in the instant case pointed out in its briefs in the Claims Court and Federal Circuit that the proper basis for the imposition of deficiency interest would be an express amendment extending the reach of section 6601(d) to cover foreign tax carrybacks. The Government admitted that such carrybacks were not covered by existing section 6601(d). Instead of following this legitimate path, however, the government sought to impose deficiency interest by resort to common law and equitable principles derived from *Seeley* and *Koppers,* which were 1950 and 1955 Supreme Court decisions that dealt with other statutory provisions. The taxpayer brought suit in the Claims Court to recover the interest it paid.

In 1997, in the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, section 1055, 111 Stat. 788, Congress enacted a statutory amendment to impose interest in foreign tax carryback cases on a prospective basis, in precisely the form the taxpayer had suggested would be required if Congress were to decide to impose deficiency interest in these circumstances. Importantly, the Conference Report expressly referenced the Claims Court decision in *Fluor Corporation* v. *United States*, noted that the government had appealed that decision, and stated that "[n]o inference is intended regarding the computation of interest under present law. . . ." H.R. Rep. No. 105-220 at 575-76 (July 30, 1997).

Nonetheless, the Conference Report estimated that the enactment of this new provision will increase Government revenue by $27 million over the 1997-2007 fiscal years. *Id.* at 793. There would not have been a revenue increase, however, if this enactment merely restated the pre-existing rule, suggesting that, if any inference were to be drawn from the legislation, it should have been in favor of the taxpayer. Yet the Federal Circuit incongruously found that the 1997 legislative action by Congress "undercuts" the taxpayer's position under prior law. (A-19.)

Documents requested by the taxpayer on February 1, 1994 under the Freedom of Information Act, but only released on October 29, 1997, after the issuance of the Federal Circuit's opinion in the Government's favor, disclose that the Government purposefully chose to litigate this issue, rather than to seek amendatory legislation from Congress, in order to secure retroactive effect for the Government's position. Legislation to legitimize this position was initiated in Congress only after the Claims Court's decision in the taxpayer's favor. The taxpayer submits that the Government's high-handed use of the courts to raise revenues that were not authorized by the Congress in 1958 when it adopted section 904(c) -- or for some 40 years thereafter -- should not be allowed to stand. The Supreme Court should not permit its decisions in other statutory contexts to be used improperly to raise revenues which Congress never authorized by statute.

The Supreme Court in recent years has emphasized the importance of discerning Congressional intent by focusing on the precise statutory language adopted. In this regard, the Supreme Court has recently granted certiorari in *Atlantic Mutual Insurance Co.* v. *Commissioner,* 111 F.3rd 1056 (3rd Cir. 1997), apparently in order to clarify the effect to be given to legislative history in interpreting Treasury regulations issued under the Internal Revenue Code. 118 S. Ct. 334 (October 20, 1997). The instant case is of even more

importance from a jurisprudential standpoint. This case raises the issue of whether this Court's opinions in particular statutory contexts can be legitimately construed to create common law and equitable principles that will overrule the express provisions of Congress in other statutory contexts. The instant case provides an opportunity for this Court to delineate how its recent pronouncements on statutory interpretation, as reflected in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and related cases, apply under the Internal Revenue Code. The Supreme Court would perform a vital public service, one that only it can perform, if it defines the effect to be given to its decisions by the Internal Revenue Service and lower courts in interpreting tax legislation.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit cites this Court's decisions in *Seeley* and *Koppers* as authorities to justify the Federal Circuit's disregard of Congress' clear statutory language in section 904(c). The interplay between judicial authorities and congressional intent raises important issues of statutory interpretation.

The reasoning of the Federal Circuit is in direct conflict with recent Supreme Court decisions that emphasize judicial reliance on statutory language to establish Congressional intent. A decision by this Court establishing that the principles of interpretation in *Chevron, U.S.A., Inc.* and related Supreme Court cases apply in cases arising under the Internal Revenue Code would assure uniformity of treatment consistent with the proper application of federal tax laws. Public sensitivity to abuses of power by the Internal Revenue Service is high, and the Supreme Court should explicate the standards of interpretation to be used in applying federal tax statutes.

The specific issue here -- the effect which foreign tax carrybacks have on deficiency interest -- affects many U.S. corporations with business operations outside the United States. Although Congress has addressed this issue for taxable years beginning after August 5, 1997, there are many pending disputes in this regard under the 1954 and 1986 Codes, and sizable amounts are at issue. For example, there is a case pending in the United States Tax Court, *Intel Corporation and Consolidated Subsidiaries* v. *Commissioner*, No. 23010-89 (T.C. filed Sept. 19, 1989), that, whichever way the deficiency interest issue is decided, will almost certainly be appealed to the United States Court of Appeals for the Ninth Circuit. The Federal Circuit's decision is the first appellate decision that deals with this issue. Since it is very likely that this issue will be presented to other Circuit Courts, there is a very real possibility that a

divergence of decisions will arise. A decision of this Court would resolve promptly and effectively many costly pending controversies.

I. The Decision Below Relies on Common Law and Equitable Principles to Override the Clear Statutory Language of Congress That Negates the Imposition of Deficiency Interest in Foreign Tax Carryback Cases

The statutory provisions applicable to the instant case are straightforward and are set forth in plain language. Section 6601(a) provides in general for interest on tax deficiencies:

> *GENERAL RULE* -- If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid.

The "amount of tax imposed" for a taxable year is reduced by any carrybacks to that year. Thus, in the absence of a contrary statutory provision, a carryback that reduces or eliminates the amount of tax imposed for a year also reduces or eliminates the tax deficiency for that year on which interest would otherwise be imposed. In other words, if there is no tax deficiency under section 6601(a), there can be no deficiency interest under section 6601(a).

Section 6601(d) provides that, for purposes of section 6601(a), designated loss and credit carrybacks

> *shall not affect the computation of interest* under this section for the period ending with the filing date for the taxable year in which the

> [designated carryback] arises. (Emphasis added.)

If section 6601(a) were intended to apply when foreign taxes are carried back to a prior year, language like that in section 6601(d) would have been provided by Congress in 1958, when the foreign tax carryback provisions were enacted. The statute would have expressly stated that the foreign tax carryback "shall not affect" the computation of interest, as it does with net operating losses and other designated carrybacks. However, the statute did not so state, and the government conceded that section 6601(d) did not apply to foreign tax carrybacks before the recent 1997 amendment to the Code which made it apply by the addition of the express "shall not affect" language. (A-42-43.)

Section 6601(a) imposes interest on a tax deficiency from the "last day prescribed for payment" to the "date paid." However, carrybacks are statutorily created offsets to income or tax and do not involve "tax payments." Consequently, to apply section 6601(a) to carrybacks requires that the ending date for the interest computation period be specified, e.g., "the last day of the taxable year" or "the filing date for the taxable year," as reflected in section 6601(d) and its predecessors with respect to specifically designated carrybacks. However, no ending date is specified for foreign tax carrybacks because Congress did not intend section 6601(a) to apply in such circumstances.

Nonetheless, the Federal Circuit supplied an ending date for the interest computation based on the same common law approach it utilized to find a liability for the interest, namely, invoking the *Seeley* and *Koppers* Supreme Court decisions. Moreover, on the "ending date" issue, the Federal Circuit had to take an even more activist role than with the liability issue. *Seeley* dealt with a bankruptcy proceeding and *Koppers* involved an excess profits tax determination, neither of which situations were even remotely analogous to

the foreign tax carryback situation from a computational standpoint. The Federal Circuit thus had to construct an ending date for the deficiency interest computation out of whole cloth. There was no analogous authority whatsoever for the computational aspect of its decision. (A-21-22.)

Under section 901(a), taxpayers may elect to claim a credit for certain foreign taxes. Section 904(a) imposes an annual limitation on the amount of the foreign tax credit that may be claimed under section 901. This limitation is based upon the ratio which the taxpayer's foreign source taxable income bears to its entire taxable income. Any foreign taxes that are not creditable in a particular taxable year are treated as "excess foreign taxes."

Section 904(c) provides for carrybacks and carryforwards of excess foreign taxes that exceed the section 904(a) limitation as follows:

> [Excess foreign taxes] *shall be deemed taxes paid or accrued* to foreign countries or possessions of the United States in the second preceding taxable year, in the first preceding taxable year, and in the first, second, third, fourth, or fifth succeeding taxable years, in that order .... *Such amount deemed paid or accrued in any year* may be availed of only as a tax credit and not as a deduction and only if the taxpayer for such year chooses to have the benefits of this subpart .... (Emphasis added.)

The instant case involves a carryback of excess foreign taxes to 1982. Section 904(c) requires that foreign taxes that are carried back to a prior taxable year are "deemed taxes paid or accrued" for such year. There would be no deficiency interest in this case if the foreign taxes at issue had initially accrued in 1982, since there would be no tax

imposed upon which deficiency interest could be assessed. Nor should there be any deficiency interest when the foreign taxes are, pursuant to section 904(c), "deemed taxes paid or accrued" in 1982. Those foreign taxes similarly reduce the "amount of tax imposed" for 1982 and thereby eliminate any underpayment of tax upon which deficiency interest could be imposed under section 6601(a).

Similarly, there are many other instances in which, for U.S. tax credit purposes, foreign taxes are deemed to accrue by the United States in years prior to the years in which they are generated, thereby producing a retroactive effect that eliminates deficiency interest that would otherwise be payable. For example, under section 905(c), if there is a refund of a foreign tax that has been previously claimed as a credit, no interest is payable on the deficiency that is thereby created except to the extent interest was paid by the foreign country. Nor would there be an issue regarding interest accrual if a foreign tax liability were contested and foreign taxes subsequently assessed. The Internal Revenue Service has concluded that, when a foreign tax dispute is settled, any additional tax that is payable to the foreign jurisdiction is creditable for U.S. tax purposes, in the year to which the dispute pertains, not the later year in which the foreign taxes are paid. Rev. Rul. 58-55, 1958-1 C.B. 266, amplified by Rev. Rul. 84-125, 1984-2 C.B. 125. This relation back may eliminate a tax deficiency for that prior year, in which case the prior year deficiency interest would also be eliminated.

Based on a straightforward reading of section 904(c), the Claims Court below held in favor of the taxpayer, stating that "[t]he intent of Congress can be discerned from the plain language of the statute. Congress provided in § 904(c) that the carryback of the credit for excess foreign tax paid 'shall be deemed taxes paid or accrued' in the earlier year." (A-36.) Once it is perceived that Congress has provided an accounting rule for the excess foreign taxes that generate the credit in the year the credit is allowed -- and only in that

year -- the statute unambiguously eliminates the tax deficiency for that year and, at the same time, any interest that might otherwise have been generated by such deficiency.

In contrast to the Claims Court, the Federal Circuit asserted there was "an ambiguity as to whether Congress meant the language of section 904(c) to forbid the assessment of interest on a previous tax deficiency that is erased as a result of the foreign tax carryback." (A-11.) By finding an ambiguity in the statutory language, the Court was able to "look beyond the language of section 904(c) to determine whether the taxpayer is liable for deficiency interest." (A-12.) Despite finding that Congress in section 6601(d) "in effect codifies the rule of *Seeley Tube* and *Koppers* for all the carryback provisions that the statute covers" (A-17), the Federal Circuit chose to resort to these two Supreme Court decisions, arguing that when Congress enacted section 904(c) in 1958 "it is assumed to have acted with awareness of judicial interpretations of the prior law." (A-18.)

The absurdity of this position is patent. Why would Congress in 1958, some four years after it codified *Seeley* and *Koppers*, choose to adopt a non-statutory approach based on those decisions in dealing with the effect of foreign tax carrybacks on deficiency interest? And why would Congress adopt a non-statutory approach for deficiency interest, while at the same time adopting statutory provisions dealing expressly with refund interest and the statute of limitations with respect to deficiency and refund claims arising from foreign tax carrybacks? In every other instance in which Congress legislated under the 1954 and 1986 Codes with respect to carryback items, the interest and statute of limitations consequences of carrybacks included an express deficiency interest provision. Did Congress actually intend to omit such a provision in the one case of foreign tax carrybacks in order to rely on Supreme Court decisions it

had previously superceded by express statutory language codifying their results? As discussed below, there are compelling reasons to believe that the omission of a provision imposing deficiency interest in foreign tax carryback cases was based on policy considerations to avoid double taxation by the United States of amounts already taxed by foreign countries. Regardless, it was not the place of the Federal Circuit to legislate in this regard. As this Court has recently stated: "The facile attribution of congressional 'forgetfulness' cannot justify [judicial] usurpation." *West Virginia Univ. Hosps., Inc.* v. *Casey,* 499 U.S. 83, 101 (1991). This Court stated: "This argument profoundly mistakes [the judicial] role." *Id.* at 100.

Thus, it is submitted that the Federal Circuit incorrectly found the plain language of section 904(c) to be ambiguous, with the consequence that it improperly applied common law and equitable principles derived from *Seeley* and *Koppers*. In contrast, a standard of interpretation based on applying the precise words of the statute clearly results in a decision for the taxpayer, as was determined by the Claims Court. Accordingly, the Supreme Court should establish the correct standard of interpretation to be applied by the lower courts in applying the Internal Revenue Code.

It should be noted that the policy, legislative history, and administrative practice relating to the foreign tax carryback provisions are entirely consistent with the "plain language of the statute." Section 904(c) was enacted in 1958 to further a "matching" policy that is designed to take account of the differences between United States and foreign tax accounting rules. Elimination of deficiency interest achieves the legislative intent to match the U.S. credit for foreign taxes with the U.S. inclusion of foreign income in the U.S. tax base. Further, the legislative history of section 904(c) and related sections demonstrates that Congress understood that it was eliminating not only a deficiency in tax but any related interest as well by

"deeming" the excess foreign taxes to be "accrued" in the prior year to which they are carried. Finally, for almost 34 years following the 1958 adoption of the foreign tax carryback provisions, the Internal Revenue Service gave no indication that it disagreed with the position that no interest was due in these circumstances. Only long after the taxable year at issue did the government institute a new policy seeking interest in these circumstances. Thus, if they were properly invoked, all of the standard methods of statutory interpretation support the plain and unambiguous language of the statute and the Claims Court's decision in favor of the taxpayer.

It is important to recognize that particular Congresses over the years have clearly demonstrated, with respect to the issue raised in the instant case, their inherent right and ability to change policy by clear statutory amendments. Prior to 1958, there were no foreign tax carryback provisions. From 1958 when the carryback provisions were enacted until 1997, the Code provided for the carryback of foreign taxes, but not for the accrual of interest on the tax deficiency eliminated by such carrybacks. This reflected a policy of giving foreign tax credit "matching" considerations priority over "time value of money" considerations. After 1997, Congress has imposed interest in deficiency cases and "time value of money" considerations now have priority over foreign tax credit "matching" considerations. Similarly, the computation of interest is now clearly provided for in the statute until the "filing date" for the taxable year in which the excess foreign taxes were generated. Whatever the relative merits from a policy standpoint of using the "end of the taxable year" or the "filing date" for such year – and particular Congresses have over the years provided for one or the other with respect to statutorily designated carrybacks — the Congress has now provided clear statutory language for the computation of interest in foreign tax carryback cases. In sum, particular Congresses since 1958 have acted clearly based on their decisions as to appropriate

policy, and the courts should apply the statutory provisions enacted. The Federal Circuit should not have invoked common law and equitable rules based on inapplicable Supreme Court decisions to overrule the clear statutory language provided from time to time by particular Congresses.

II. The Decision Below Construes Supreme Court Decisions in 1950 and 1955 (Interpreting the Internal Revenue Code of 1939 and the Excess Profits Tax Act of 1940) to Create Common Law and Equitable Principles Applicable Under the Internal Revenue Codes of 1954 and 1986, a Position Which is in Direct Conflict With More Recent Supreme Court Decisions That Require Reliance on Statutory Language

The applicable legal principles of statutory interpretation currently followed by the Supreme Court are set forth in *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court stated there that when congressional intent is clear from reading the statute, "that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Thus, "if the language of a statute is clear, that language must be given effect -- at least in the absence of a patent absurdity." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (citing Supreme Court cases dating back to 1820 and discussing *Chevron*).

There is a strong presumption that Congressional intent is expressed through the precise words of the statutory language that has been enacted. This Court has held that when the meaning of a text is plain, there is no need for recourse to legislative history. *West Virginia Univ. Hosps., Inc.*, 499 U.S. at 101; *see also United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

In order to support its disregard of the text provided by Congress, the Federal Circuit invoked a number of canons of construction and presumptions which have no justification under recent Supreme Court decisions. Thus, relying on dictum in *Seeley*, the Federal Circuit said there needed to be

a "clear legislative expression" of intent that no deficiency interest was to be imposed. (A-9.) According to the Federal Circuit, the text of the statute itself was not regarded as sufficient evidence of legislative intent, but legislative history in the form of a committee or conference report was demanded in addition. (A-11-12, A-15.) Why, however, should Congress be required to produce legislative history expressly stating that it had not provided for deficiency interest in the statute if the statute itself clearly did not provide for such interest? While there would be no harm -- and perhaps some useful redundancy -- if legislative history spelled out something the Congress did not do in the statute, to make a case turn upon the absence of express legislative history reflects fallacious reasoning by the Federal Circuit. The question in the instant case is one of law and construction of the statutory text. The burden on the taxpayer is not to find express legislative history but to provide a construction of the statute that supports its position. Thus, the resort to this dictum in *Seeley* and a canon of construction that goes beyond the normal requirements of clear statutory language improperly imposes an additional -- and in this case, insurmountable -- burden on the taxpayer.

Similarly, the Federal Circuit interpreted the express provision in section 6611(g) providing that there would be no refund interest in foreign tax carryback cases as indicating that Congress wanted parallel or symmetrical treatment with respect to deficiency interest. Deficiency interest should be imposed, according to the Federal Circuit, as a "natural counterpart" of the refund interest provisions. (A-14.) In contrast, the taxpayer cited other cases setting forth a contrary presumption, namely, if Congress expressly covers one specified case, it is presumed that it did not seek to cover a related case that is not specifically covered. *See, e.g., Sharp* v. *United States*, 14 F.3d 583, 584 (Fed. Cir. 1993). Such a presumption would have supported the position of the Court of Claims that the language of the statute was clear

that deficiency interest was not provided for and any arguably non-parallel or asymmetrical treatment of the deficiency and refund interest provisions resulting from the statutory provisions must be accepted by the courts. (A-30-31.) *See also Universal Film Exch., Inc.* v. *United States*, 230 F. Supp. 518, 521 (S.D.N.Y. 1964) (stating that "[the] fact that the government is entitled to interest and the taxpayer is not is, of course, not determinative, for in this area what is sauce for the goose is not necessarily sauce for the gander."), *aff'd*, 345 F.2d 1006 (2d Cir. 1965).

As a matter of law, the issue here should turn upon the clear statutory language rather than upon the precedence to be given to dueling presumptions of statutory construction. In this case, clear statutory language provides that no deficiency interest is to be imposed. As Justice Scalia has recently written in a book entitled *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997), pp. 22-23:

> The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: "Only a day or two ago – when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means." (Footnotes omitted.)

Not only is the use of the dictum in *Seeley*, which suggests a requirement for Congress to produce legislative history in addition to the statute, misguided in this context, but it gives legislative history a role which is totally

unwarranted under recent Supreme Court cases like *Chevron* and *West Virginia University Hospitals, Inc.* Legislative history may be useful, if statutory language is ambiguous, but it is to be used as an aid to interpreting the statute. A decision based on the absence of legislative history when the statute provides a "clear legislative expression" essentially reverses the proper relationship between the statute and legislative history.

In contrast to the Federal Circuit's decision in the instant case, its decision in *Shriners Hospitals for Crippled Children* v. *United States*, 862 F.2d. 1561 (Fed. Cir. 1988), is particularly instructive. That case involved an amendment of a will, subsequent to the filing of a federal estate tax return. The amendment enabled the estate to qualify for a charitable deduction. The Federal Circuit found that Congress had intended that the statute involved should be retroactive for all purposes, stating that:

> Tax and interest payments are creatures of statute, and such statutory provisions are to be given their plainest reasonable meaning, in implementation of the discernible intent of Congress.
>
> . . . .
>
> The effect of this provision is as if the tax were never due. If no tax was due, there can not have been a deficiency assessed, or interest for late payment thereof.
>
> . . . .
>
> It would contravene Congress' intent to give retroactive effect to this provision for all purposes, to assess interest on late or underpayment of a tax that was not owed.

Id. at 1563, 1564.

Similarly, in *Oxford Orphanage, Inc.* v. *United States*, 775 F.2d 570 (4th Cir. 1985), involving the same statutory provisions, the Fourth Circuit concluded that the amendment not only eliminated what would otherwise have been a tax deficiency, but also eliminated the related deficiency interest. The Court reasoned that

> Retroactive application of the amendment [to the will] is a central element of the statutory scheme . . . . Nothing in the text of the statute or in the legislative history indicates that retroactivity is a hybrid, effective for a charitable deduction but ineffective with respect to the government's claim for interest . . . . The retroactivity of the amendment to a will renders § 6601 inapplicable.

Id. at 572, 573.

The Federal Circuit chose to distinguish its decision in *Shriners Hospitals* and the Fourth Circuit's decision in *Oxford Orphanage* by placing "special reliance on evidence in the legislative history indicating that Congress's intent was to make the statute retroactive 'for all purposes,' . . ." (A-15). The Federal Circuit then concluded, based on *Seeley*, that "the foreign tax carryback statute must be construed not to alter the basic rule that interest is due when a taxpayer underpays its taxes." (A-15.) But there is no "basic rule" other than what Congress specifically provided in the statute, which means that legislative history is being used to override the statute. Since the statute does not require the payment of deficiency interest in foreign tax carryback cases, *Seeley* cannot be properly invoked to achieve this result.

What essentially underlies the disregard of the text and the improper invocation of canons of construction and presumptions is the proper role of the courts in relationship to the Congress. The Federal Circuit has, in effect, chosen to legislate a provision which the Congress has shown that it could add to the Code but chose to do so only prospectively. The Federal Circuit decision, in effect, is a judicially enacted statutory amendment applicable to the period from 1958 to 1997. Congress would not have enacted such a provision because of the blatant unfairness involved. Congresses often change their minds on the policy to be implemented in tax statutes, but they almost always do so prospectively, and in no case has a Congress ever made a law go back forty years. In this case, the Congress avoided any retroactivity in its 1997 amendment of the statute. In sum, the arbitrariness of the lower court's retroactive enactment is violative of basic standards of fairness that would guide any legislature.

This Court has stated that:

> It is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation.

West Virginia Univ. Hosps., Inc., 499 U.S. at 101. In a closely analogous tax case, this Court stated:

> We can only take the Code as we find it and give it as great an internal symmetry and consistency as its words permit. We would not be faithful to the statutory scheme, as revealed by the words employed, if we gave "paid or accrued" a different meaning for the purposes of § 122(d)(6) than it has in the other

> parts of the same chapter. . . . The fact that the construction we feel compelled to make favors the taxpayer on the cash basis and discriminates against the taxpayer on the accrual basis may suggest that changes in the law are desirable. But if they are to be made, Congress must make them.

United States v. *Olympic Radio & Television Inc.*, 349 U.S. 232, 236 (1955); *see also Griffin* v. *Oceanic Contractors Inc.*, 458 U.S. 564, 576 (1982) ("It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this court. Congress may amend the statute; we may not.")

Not only did the Federal Circuit incorrectly invoke the *Seeley* and *Koppers* decisions, but it misinterpreted the clear meaning of those decisions. In *Seeley*, the Supreme Court in 1950 interpreted the 1939 Code which contained only a few primitive interest provisions. In contrast, in this case, this Court in 1998 must interpret the 1954 and 1986 Codes which have a fully elaborated structure including many specific interest provisions that were added in both the 1954 codification of the Code and afterwards. Since the enactment of the 1954 Code, Congress has always specified the treatment of carrybacks for interest purposes and has thereby eliminated the need for the kind of common law interpretation that was required in *Seeley* with respect to the 1939 Code and *Koppers* with respect to the Excess Profits Tax Act of 1940. In this regard, the Tax Court has recently concluded, in rejecting a taxpayer's assertions of common law time value of money claims, that time value of money concepts can be applied only in the presence of a specific legislative directive to do so. *City of New York* v. *Commissioner*, 103 T.C. 481, 487 (1994), *aff'd*, 70 F.3d 142 (D.C. Cir. 1995).

In addition to *Seeley*, the Federal Circuit relied on *Koppers*, which involved excess profits tax liabilities for the years 1940 through 1945 that were abated by subsequent legislation. The issue in *Koppers* was whether that legislation also abated the underpayment for deficiency interest purposes. This Court observed that: "Congress could have prescribed either treatment but did not expressly specify either. Our answer is determined from our consideration of the statutory scheme as a whole, the related provisions of the statute, the legislative history of § 722 and the administrative interpretation that has been given the statute." *Koppers,* 348 U.S. at 261.

Subsequent cases make it clear that *Seeley* and *Koppers* are not precedents for imposing common law and equitable principles in other statutory contexts. *See, e.g., Universal Pictures Co.* v. *United States*, 237 F. Supp. 169, 175 (S.D.N.Y. 1964), *aff'd,* 345 F.2d 1002 (2d Cir. 1965). In this case, the district court said:

> Each opinion [*Seeley* and *Koppers*] extensively analyzes the statutory scheme and the applicable portions of the statute. To characterize these holdings as based on equitable doctrines is at best misdescriptive.

Universal Pictures Co., 237 F. Supp. at 175. In affirming the district court, the Second Circuit said:

> Judge Levet's rejection of the claim for interest from December 1949 based on an equitable `use of money' doctrine is entirely sound. Neither *Manning* v. *Seeley Tube & Box Co.*, . . . nor *United States* v. *Koppers Co.*, . . . creates any such doctrine. Mutuality of result is irrelevant; for interest to run against the Government, taxpayer must point

> to a specific statutory provision. There is none for this situation.

Universal Pictures Co., 345 F.2d at 1006.

Thus, *Seeley* and *Koppers* stand for the principle that the particular statutory provisions in question must be examined to determine Congress' intent concerning the retroactivity of the provision for deficiency interest purposes. In the instant case, the applicable statutory provisions provide clearly for retroactive adjustment, and, consequently, there was no justification for resorting to common law and equitable principles to resolve an issue which Congress had specifically addressed.

The leading case in determining the deference to be given to agency positions is *Chevron, U.S.A., Inc.* While *Chevron* is not a tax case, some tax cases establish that, if a statute is ambiguous, the standard of review for an agency regulation is "whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979). *Accord United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 25 (1982). The Tax Court (Tannenwald, J.) recently stated:

> [W]e find it unnecessary to dissect the differences, if any, between *Chevron* and *National Muffler*, although we are inclined to the view that the impact of the traditional, *i.e.*, *National Muffler* standard, has not been changed by *Chevron*, but has merely been restated in a practical two-part test with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation.

Central Pennsylvania Sav. Ass'n v. *Commissioner*, 104 T.C. 384, 392 (1995), *op. supplemented by* 71 T.C.M. (CCH) 2724 (1996).

In the instant case, there was not even a Treasury regulation interpreting the statutory provision. The only official description of the Government position was the issuance by the Internal Revenue Service of Technical Advice Memorandum 93-13-003, dated December 9, 1992 but not made public until April 2, 1993, long after this case commenced. Moreover, a Technical Advice Memorandum is applicable only to the particular taxpayer involved and may not be relied on by taxpayers as legal authority. Section 6110(j)(3). It is not authoritative like a properly issued regulation. Thus, the Internal Revenue Service position expressed in Technical Advice Memorandum 93-13-003 is entitled to no deference and the Federal Circuit should have straightforwardly applied the applicable statutory provisions as called for by *Chevron* and related decisions of this Court. *Cf. Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686 (1962) (rejecting the IRS' position as to the amortization of a bond premium, noting that "the respondent's regulations contained not the slightest hint of the distinction urged upon us here").

It is important for the Supreme Court to make clear that the principles of statutory interpretation which it has recently enunciated in non-tax cases also apply under the Internal Revenue Code. Like the *Atlantic Mutual Insurance Co.* case, in which the Supreme Court has recently granted certiorari, 118 S. Ct. 334 (October 20, 1997), the instant case provides a unique opportunity for the Court to address this very important issue. It would be particularly useful for the Court to establish the correct interpretive principles in this case because the Congress in 1997 demonstrated its ability to take legislative action to amend section 6601(d) if it chose to change its policy. The Government should not be allowed to resort to the courts to impose tax and interest obligations

retroactively under common law and equitable principles when Congress has decided not to do so. Taxation is not only distinctly statutory, but in the length and complexity of the Code, it reflects to an extreme degree the difficulties created by the enactment of highly particularized provisions by many Congresses. Such statutes present many troublesome legal issues for the executive branch, taxpayers and the courts. Ultimately, if the Congress does not impose tax or interest, the taxpayer is not required to pay such amounts. The courts should not support revenue raising by government administrative fiat in defiance of express statutory language of Congress.

In the instant case, documents secured under the Freedom of Information Act show the Government purposely chose to resort to the courts rather than to seek forthrightly the legislative changes it wanted from the Congress. The courts have been misused in the instant case, particularly so because the Federal Circuit has been persuaded by the Government to misinterpret Supreme Court decisions that are not relevant to the interpretation of the applicable statutory provisions. It is submitted that the Supreme Court should not let the Federal Circuit decision stand and should establish a clear precedent that requires the lower courts to apply the plain language of the statute in tax cases, just as with any other area of the law. Common law and equitable principles purportedly derived from Supreme Court decisions should not be used to raise revenues not provided for by the statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Stanford G. Ross
Counsel of Record
James P. Joseph
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioner

Dated: January 13, 1998

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United States Court of Appeals for the Federal Circuit

96-5130

FLUOR CORPORATION AND AFFILIATES,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant

ORDER

Before NEWMAN, CLEVENGER, and BRYSON, Circuit Judges.

A petition for rehearing having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that rehearing be granted for the limited purpose of modifying this court's opinion.

IT IS FURTHER ORDERED that the previous opinion of the court in this appeal is withdrawn. The new opinion accompanies this order.

FOR THE COURT,

// s //

Dated: 10/17/97 JAN HORBALY, CLERK

cc: Stanford G. Ross
Charles Bricken

United States Court of Appeals for the Federal Circuit

96-5130

FLUOR CORPORATION AND AFFILIATES,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: August 19, 1997
AMENDED: October 17, 1997

Before CLEVENGER, RADER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

This tax case presents the question whether a taxpayer is liable for interest on a tax deficiency when the deficiency is later erased by a foreign tax carryback. The Court of Federal Claims held that the effect of the carryback was to release the taxpayer from both the tax underpayment and interest on that underpayment. We hold that while the foreign tax carryback eliminated the original tax deficiency for taxable year 1982, it

did not release the taxpayer from the obligation to pay interest on that tax deficiency, and we therefore reverse.

I

A

Under prescribed circumstances, the Internal Revenue Code allows a "foreign tax credit" to U.S. taxpayers. See 26 U.S.C. § 901(a). For domestic corporate taxpayers, the credit is equal to "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States." 26 U.S.C. § 901(b)(1). The Code, however, limits the amount of the foreign tax credit that can be taken in a particular year. Specifically, the ratio of the foreign tax credit to the taxpayer's pre-credit United States tax liability cannot exceed the ratio of the taxpayer's taxable income from the foreign country to the taxpayer's total taxable income. See 26 U.S.C. § 904(a). For cases in which the ceiling on the amount of the credit that can be taken in a particular year is too low to exhaust the amount of the credit available to the taxpayer, the Code permits the excess foreign tax to be carried back to the two preceding taxable years, and then carried forward to each of the five succeeding taxable years until the excess foreign tax is exhausted. 26 U.S.C. § 904(c). The statute effects the carryover by providing that the foreign tax credit that is carried back or carried forward "shall be deemed taxes paid or accrued to foreign countries or possessions of the United States" in the carryover years. Id.

B

The pertinent facts of this case are not in dispute. Plaintiff, which we refer to as Fluor, is an affiliated group of corporations. For its tax year ending October 31, 1982, Fluor

underpaid its federal income taxes, and the Internal Revenue Service assessed a deficiency for that year. In Fluor's 1984 tax year, it paid foreign taxes that generated a foreign tax credit under section 901. Because the full amount of its 1984 foreign tax credit could not be used in 1984, Fluor exercised its right under section 904(c) to carry a portion of the tax back to its 1982 tax year. Setting aside some of the details of the tax transactions at issue, the effect of the carryback of the excess 1984 foreign tax was to eliminate Fluor's 1982 tax deficiency.

The parties agreed that following the application of the tax credit Fluor was not liable for the tax deficiency that had been assessed for 1982. The parties did not, however, agree on whether Fluor was liable for interest on the deficiency that accrued prior to the time the credit became available. When the IRS insisted that Fluor was liable for interest on the deficiency between 1982 and 1984, Fluor paid the interest and filed an action in the Court of Federal Claims seeking a refund. The Court of Federal Claims ruled in Fluor's favor, holding that Fluor was entitled to a refund of the assessed interest for the 1982 deficiency, plus interest on the refunded amount. The government has appealed that judgment to this court.

II

What is in dispute in this case is whether Fluor is liable for interest on the 1982 tax deficiency during the period between the time its 1982 taxes were due and the time its 1984 foreign tax credit was applied to eliminate the 1982 deficiency. Fluor argues, and the Court of Federal Claims agreed, that Fluor does not owe interest on the 1982 deficiency because the 1984 foreign tax credit must be treated as if it were a tax paid in 1982. Accordingly, Fluor argues, the foreign tax carryback from 1984 eliminated the 1982 deficiency nunc pro tunc and

destroyed any justification for assessing interest charges for the deficiency against Fluor. The government, on the other hand, argues that the 1982 deficiency was not eliminated until the foreign tax credit became available in 1984. Accordingly, the government contends that it should not be deprived of its statutory right to interest on the deficiency during the period after the deficiency arose and before it was eliminated by the foreign tax carryback.

At the time this case arose and was litigated in the Court of Federal Claims, the Internal Revenue Code did not provide a clear answer to the question presented here. Congress, however, has recently amended the Code to include an explicit provision requiring that a taxpayer in Fluor's position pay interest on a deficiency that is subsequently eliminated by a foreign tax carryback. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1055, 111 Stat. 788. That statutory change resolves the question presented in this case for all future years. Because the statutory change was made prospective only, however, it does not affect this case. To decide this case, which is governed by the pre-1997 version of the Code, we draw guidance from the principles announced in two closely analogous decisions of the Supreme Court and from the statutory context in which this issue arose.

A

In the first of the two Supreme Court cases, Manning v. Seeley Tube & Box Co., 338 U.S. 561 (1950), the government assessed a deficiency in Seeley's 1941 taxes with interest from the date the taxes were due. Seeley later filed a return for 1943 in which it showed a net operating loss for that year. When carried back to 1941, the net operating loss was sufficient to eliminate Seeley's tax liability for that year. The Commissioner abated the deficiency, but refused to refund the interest that had been assessed on the deficiency.

The Supreme Court ruled that the Commissioner had properly withheld the interest on the deficiency, holding that the "subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency." 338 U.S. at 565. For the period that the deficiency was outstanding, the Court explained,

> the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period. In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed to the Government for the period it is owed must be answered in favor of the Government.

Id. at 566.

The Court began its analysis by stating the general principle, evidenced by a number of statutory provisions, that "Congress intended the United States to have the use of money lawfully due when it became due." 338 U.S. at 566. Thus, the Court noted, when the Commissioner assesses a deficiency "he also may assess interest on that deficiency from the date the tax was due to the assessment date." Id. The carryback provision did not alter that principle, the Court explained, and it should not "be interpreted as deferring or delaying the prompt payment of taxes properly due." Id. at 567.

The Court found support for its position in the statute that prohibits a taxpayer who pays a tax that is later abated by a carryback from claiming interest from the government for the intervening period. That statute, the Court explained, makes it clear that Congress "did not intend to change the basic statutory policy: the United States is to have the possession and use of the lawful tax at the date it is properly due." 338 U.S. at 568.

Finally, the Court stated that to sustain Seeley's contention "would be to place a premium on failure to conform diligently with the law." 338 U.S. at 568. For if a taxpayer could avoid paying interest on a deficiency that was later canceled by a carryback, "a taxpayer who did not pay his taxes on time would receive the full use of the tax funds for the intervening period," while the taxpayer who paid his taxes promptly would be statutorily prohibited from having the use of the money for that period. Id. The Court concluded: "We cannot approve such a result." Id.

Five years later, in United States v. Koppers Co., 348 U.S. 254 (1955), the Court reached a similar result in a case involving an abatement of two corporations' excess profits tax liabilities. The abatements were effected pursuant to a statute that provided relief from excess profits taxes under certain circumstances. The two corporations were assessed deficiencies in their excess profits tax payments for certain years. The deficiencies, however, were eliminated when each of the corporations applied for and obtained an adjustment in the average base period net income from which their excess profits taxes were calculated for those years.

Following the elimination of the deficiencies, the corporations argued that the interest that had accrued on the deficiencies should abate. The Supreme Court disagreed. As in Seeley Tube, the Court held that the adjustment in the

taxpayers' obligations did not have the effect of releasing the taxpayers from the duty to pay interest on the original obligations until the time that they were reduced.

In order to obtain a refund of the interest due on the prior tax deficiency, the Court held, "the taxpayer must sustain the proposition that the tax relief granted under [the adjustment provision] is necessarily retroactive, extinguishing the deficiency as of the original due date of the tax and thus eliminating the interest charges for the corresponding period." Koppers, 348 U.S. at 263. Finding that the taxpayers had not satisfied their burden of showing that the adjustment provision was intended to eliminate the interest charges as well as the deficiency for the earlier year, the Court held that the government was entitled to interest on the deficiency for the period up to the time the deficiency was eliminated. See 348 U.S. at 270-71.

Seeley Tube and Koppers provide powerful support for the government's position in this case. As in Seeley Tube, Fluor's deficiency was eliminated by a subsequent carryback. Like the taxpayers in Seeley Tube and Koppers, Fluor is subject to a general statute requiring taxpayers to pay their taxes on the date they are due or to pay interest on any deficiency until it is satisfied. As in Seeley Tube and Koppers, there is no statute specifically addressing whether the government is entitled to interest on the taxpayer's deficiency for the period before it was eliminated by the carryback. As in both Seeley Tube and Koppers, however, there is a statute that denies taxpayers the benefit of interest for the interim period if the adjustment results in an overpayment of taxes attributed to the earlier tax year.

More important than the factual similarities, Seeley Tube and Koppers establish the analytical framework for this case. Seeley Tube took as its starting point the principle,

based on the general deficiency interest statute, now codified at 26 U.S.C. § 6601 (a), that a taxpayer must pay interest on a deficiency until the deficiency is paid or otherwise abated. Any departures from that principle, the Court explained, would require "a clear legislative expression to the contrary." 338 U.S. at 566. In the absence of such a clear legislative expression, the Court noted, "the question of who should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." Id. Echoing the test set out in Seeley Tube, the Court in Koppers held that in order to avoid having to pay interest on a deficiency that was subsequently eliminated, the taxpayer "must sustain the proposition" that the tax relief in question was "necessarily retroactive, extinguishing the deficiency as of the original due date and thus eliminating the interest charges for the corresponding period." Koppers, 348 U.S. at 263.

A principal theme of both Seeley Tube and Koppers was that the taxpayers' argument, if accepted, would treat delinquent taxpayers better than taxpayers who complied with their legal obligations by paying their taxes on a timely basis. As the Court stated in Koppers, "we find nothing to justify a greater tax advantage to any taxpayer that underpays its correct tax, over one that pays such tax in full when due." 348 U.S. at 263.

B

Fluor does not dispute the government's contention that Fluor's proposed construction of the foreign tax carryback statute would benefit delinquent taxpayers over taxpayers who paid their taxes in full when due. Nor does Fluor take issue with the government's submission, based on Seeley Tube and Koppers, that Fluor bears the burden of pointing to a "clear legislative expression" to free the taxpayer of the obligation to

pay interest on a deficiency that is later eliminated by a foreign tax carryback. Fluor argues, however, that it has met that burden, and that the benefit enjoyed by delinquent taxpayers is simply a necessary consequence of the statutory scheme that Congress enacted. We disagree.

I

Fluor first argues that the plain language of section 904(c) provides the "clear legislative expression" required by Seeley Tube and Koppers. The pertinent language of section 904(c) directs that the manner in which the tax carryback operates is that the excess foreign taxes "shall be deemed taxes paid or accrued" in the applicable carryback year.

The ordinary meaning of the word "deemed" in the legal context is "considered" or "treated as if." Black's Law Dictionary 415 (6th ed. 1990); Bryan A. Garner, A Dictionary of Modern Legal Usage 254 (2d ed. 1995). The word "deemed" is used interchangeably with the words "treated as" in a closely associated provision of the Code, 26 U.S.C. § 902(a), and the legislative history of section 904(c) confirms that the statute uses the word "deemed" in that sense. See H.R. Rep. No. 85-775, at 82 (1957) (the excess of the foreign taxes to be carried back or forward for any taxable year "is first to be considered as tax paid or accrued" in the second preceding year; foreign taxes carried back two years are "considered as tax paid or accrued in the second preceding year").

We thus can be confident that when Congress used the word "deemed," it meant "treated as if," and that a foreign tax paid in a particular year would be treated as if it were paid in another year. Indeed, that interpretation is necessary to effect the reduction of a deficiency in a carryback year. Moreover, it is necessary to ensure that the limitations on the amount of the

foreign tax credit that can be taken in any given year, see 26 U.S.C. § 904(a), will apply to the carryover years, just as they do to the year in which the tax is actually paid or accrued. But while interpreting the word "deemed" to mean "treated as if" answers the question of what year the credit will be applied to, it does not answer the question of when the reallocation of the foreign tax credit will be deemed to occur - whether in the carryback year or at the time the carryback was generated, one or two years later. If the reduction in the deficiency is considered to have occurred in the carryback year, it does not make sense to assess interest on the deficiency. But if the reduction in the deficiency is considered to have occurred at the time the carryback was generated, it makes sense that interest should be assessed on the deficiency during the time it was outstanding. We are thus confronted with an ambiguity as to whether Congress meant the language of section 904(c) to forbid the assessment of interest on a previous tax deficiency that is erased as a result of the foreign tax carryback.

Unfortunately, there is nothing in the language of section 904(c) or its legislative history that addresses this ambiguity. In fact, the statute and the legislative history give no indication that the "deemed taxes paid" formula was intended in any way to address the government's right to interest in the period between the assessment and cancellation of a deficiency.

The Supreme Court addressed a similar statutory ambiguity in the Koppers case, and the Court's treatment of the statute at issue in that case is instructive. The statute in Koppers provided that if the taxpayer, after being assessed excess profits taxes for a particular year, should later establish "what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income," the taxpayer's excess profits tax would be determined "by using such constructive average base period

net income in lieu of the average base period net income otherwise determined under this subchapter." 26 U.S.C. § 722(a) (1940). Pointing to the statutory provision that a constructive average base period net income would be used "in lieu of" the originally calculated average base period net income, the taxpayers argued that Congress meant the statute to be fully retroactive in effect, and that the statute therefore required both a reduction in the excess profits tax and elimination of the interest due on the underpayment of the originally assessed tax. The Court, however, regarded the pertinent language as "elastic," and as capable of being read to mean either that "the new computation replaces and abates the old one currently, when the new one is determined and assessed," or that it "retroactively replaces the old tax from its original due date." 348 U.S. at 264.

The same must be said of the closely analogous language of section 904(c). As we have noted, section 904(c) does not make clear whether Congress envisioned the foreign tax credit as replacing and abating the prior tax deficiency as of the time the foreign tax credit is applied to the carryover year, or as replacing the prior deficiency "from its original due date." Koppers, 348 U.S. at 264. We therefore agree with the government that in this case, as in Koppers, we must look beyond the language of section 904(c) to determine whether the taxpayer is liable for deficiency interest.

The first step in analyzing the statutory framework that governs this case is to look to the general provision for deficiency interest, 26 U.S.C. § 6601(a). That statute requires a taxpayer to pay interest on any deficiency from the time the deficiency arises until it is paid or otherwise abated. At the time payment was due for its 1982 taxes, Fluor did not make the required payment. The government was therefore deprived of that money for the period between the time the 1982 tax deficiency should have been paid and the time the deficiency

abated by operation of the foreign tax credit. Without more explicit directions regarding interest, section 6601(a) compels the conclusion that the government is entitled to interest for that interim period. Because section 904(c) does not supply an explicit and unambiguous exception to the rule of section 6601(a) for foreign tax carrybacks, the rule of section 6601(a) must control.

The other pertinent statutory provision is 26 U.S.C. § 6611(g), which provides that the government shall not be liable for interest when a foreign tax carryback creates an overpayment by the taxpayer in the carryback year. Both Seeley Tube and Koppers relied heavily on analogous statutes that denied interest on overpayments created by the carryback or adjustment at issue in those cases, and the same analysis is equally applicable here. In Seeley Tube, the Court regarded the statute that denies interest on an overpayment created by a carryback as "amply support[ing]" the Court's conclusion that the carryback provision did not "retroactively alter the duty of a taxpayer to pay his full tax promptly." 338 U.S. at 567. The statutory denial of interest on overpayments, the Court added, made it clear that Congress "did not intend to change the basic statutory policy: the United States is to have the possession and use of the lawful tax at the date it is properly due." Id. at 568.

Koppers placed equally heavy weight on the statutory denial of interest on overpayments created by the adjustment at issue in that case. By precluding the payment of interest by the government on the amounts abated, the Court explained, the statute

> treats the Government as entitled to the use of the abated amounts between the time of their overpayment and that of their abatement. Equity demands a comparable result in the

> case of underpayments. Where unpaid taxes are abated by reason of [the adjustment statute], the taxpayer then receives a release from its existing obligation to pay the amount abated. However, the Government having been entitled, up to that time, to collect and use the sum abated, the Government should receive interest on the abated sum, for the period during which the Government was entitled to have its use. This is the natural counterpart of the Government's freedom from paying interest on refunded overpayments.

348 U.S. at 267. Applying that analysis here, we conclude that the "natural counterpart" of the government's freedom under section 6611(g) from paying interest on refunded overpayments attributable to a foreign tax carryback is that the taxpayer must pay interest on the deficiency for the period up to its elimination.

Fluor seeks to blunt the impact of Seeley Tube and Koppers by invoking this court's decision in Shriners Hospitals for Crippled Children v. United States, 862 F.2d 1561 (Fed. Cir. 1988). In that case, the court held that a remedial estate tax statute was intended to be fully retroactive and that the taxpayer therefore did not owe interest on a tax obligation that was eliminated by the statutory adjustment. The statute at issue in the Shriners case provided that under certain circumstances a will would be deemed reformed in a manner that avoided estate taxes that otherwise would have been due. The question on appeal was whether the estate was liable for interest on the taxes that were avoided as a result of the reformation.

Looking to the legislative history and the purpose underlying the statute, the court held that it was intended to be fully retroactive in its effect and thus to relieve the taxpayer of the obligation to pay both the prior tax deficiency and the interest on that deficiency. The court placed special reliance on evidence in the legislative history indicating that Congress's intent was to make the statute retroactive "for all purposes," and to ensure that a will that qualified for beneficial treatment under the statute would be "treated for tax purposes as if the amended trust was actually in the will . . . as of the date of the decedent's death." 862 F.2d at 1563 (quoting 130 Cong. Rec. 19,042 (1984) (statement of Rep. Gibbons)). See also Oxford Orphanage, Inc. v. United States, 775 F.2d 570 (4th Cir. 1985).

No such clear guidance can be found in the language or legislative history of section 904(c). Because there is no "clear legislative expression" of intent to permit taxpayers to avoid paying interest on their deficiencies if they later become eligible for a carryback under section 904(c), see Seeley Tube, 338 U.S. at 566, the foreign tax carryback statute must be construed not to alter the basic rule that interest is due when a taxpayer underpays its taxes.

2

In challenging the government's reliance on Seeley Tube and Koppers, Fluor points out that the 1954 Internal Revenue Code has more detailed provisions governing interest than did the 1939 Code, under which both Seeley Tube and Koppers were decided. The more comprehensive treatment of interest under the 1954 Code, Fluor argues, compels the conclusion that Congress would have specifically required taxpayers to pay interest on deficiencies that are subsequently canceled by foreign tax carrybacks if it had intended for interest to be payable in that setting.

It is true that the 1954 Code addresses the issue of interest in more detail than did the 1939 Code, but the differences between the two statutes do not render Seeley Tube and Koppers inapposite, because the principal statutory provisions are largely the same. First, section 6601(a), the general provision in the 1954 Code requiring the payment of interest to the government on underpayments of tax, is similar to the parallel provision of the 1939 Code. In addition, as we have noted, the 1939 Code contained a prohibition against government liability for interest when the operation of the carryback and adjustment provisions in Seeley Tube and Kopplers created a tax overpayment. That prohibition is closely analogous to the prohibition in section 6611(g) of the 1954 Code against government liability for interest on overpayments of tax resulting from the operation of the foreign tax carrybacks.

Fluor argues that Congress's enactment of a prohibition against refund interest on overpayments created by foreign tax carrybacks, in conjunction with Congress's failure to enact a parallel statute imposing deficiency interest on deficiencies eliminated by foreign tax carrybacks, gives rise to the inference that Congress did not mean to require interest to be paid on eliminated deficiencies. That argument, however, is foreclosed by Seeley Tube and Koppers, in which the Supreme Court drew the opposite inference from virtually identical statutory provisions barring the collection of interest from the government when carrybacks or adjustments created an overpayment.

Fluor points out that an explicit statutory provision in the present Code, 26 U.S.C. § 6601(d), authorizes the government to collect deficiency interest from taxpayers whose deficiencies are eliminated by net operating loss carrybacks, capital loss carrybacks, and credit carrybacks.

Fluor argues that the absence of any similar provision with respect to foreign tax carrybacks as of the time pertinent to this case is further evidence that Congress meant to prohibit the assessment of deficiency interest on tax deficiencies that are eliminated by the operation of a foreign tax carryback.

While there is some force to that argument, in the end we do not find it persuasive. Section 6601 (d) in effect codifies the rule of Seeley Tube and Koppers for all the carryback provisions that the statute covers. Fluor's argument is that because Congress codified the rule of Seeley Tube and Koppers for other carryback provisions, but not for the foreign tax carryback, the Seeley Tube-Koppers rule does not apply to the foreign tax carryback. We do not accept the contention that, by codifying the rule for some carrybacks, Congress must necessarily have meant to repudiate it for any carryback not included in the codification.

When the foreign tax carryover was enacted in 1958, section 6601(d) (which was then section 6601(e)) addressed only one form of carryback - the net operating loss carryback. It was not until later that Congress converted section 6601(d) into a catchall provision imposing deficiency interest in the case of all subsequently enacted carryback statutes. Because no such catchall provision existed in 1958, Congress's failure to alter the single-purpose section 6601(e) at that time to include a reference to foreign tax carrybacks does not compel the conclusion that Congress intended to prohibit the collection of deficiency interest in the case of foreign tax carrybacks.

In fact, the background of the foreign tax carryover supports the contrary inference. Familiar principles of statutory construction teach that Congress is presumed to be aware of judicial interpretations of the law, and that when Congress enacts a new statute incorporating provisions similar

to those in prior law, it is assumed to have acted with awareness of judicial interpretations of the prior law. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982); Lorillard v. Pons, 434 U.S. 575, 589 (1978); Kelly v. United States, 849 F.2d 1049, 1052 (Fed. Cir. 1987). That principle applies with special force in this context, because when Congress enacted the foreign tax carryover provision in 1958, Seeley Tube and Koppers were decisions of recent vintage and can be assumed to have been known to the drafters of the complex tax bill of which the foreign tax carryover was a part. It is therefore reasonable to assume that Congress intended the rule of Seeley Tube and Koppers to apply to the closely analogous foreign tax carryovers, and thus for interest to be due on any deficiency that was eliminated as a result of the foreign tax carryover. Because the rule of Seeley Tube and Koppers did not depend on specific legislation imposing deficiency interest, Congress had no need to legislate in order to ensure that deficiency interest would be imposed. Indeed, the contrary was true: In light of Seeley Tube and Koppers, an informed Congress would have assumed that specific legislation would be required if it intended deficiency interest not to accrue when a carryback eliminated a deficiency in the carryback year.

3

Fluor makes the further argument that Seeley Tube and Koppers can be distinguished because the policy underlying the statutes at issue in Seeley Tube and Koppers is quite different from the policy underlying the statute at issue in this case. The statutes in Seeley Tube and Koppers, Fluor argues, were averaging statutes that were designed to spread tax benefits from a single year over a longer period. In contrast, Fluor contends, the policy underlying section 904(c) is one of "matching," i.e., attempting to match the foreign tax credit

with the year in which the credit most appropriately belongs for domestic tax purposes.

Fluor is correct that one of Congress's purposes in allowing foreign tax carryovers was to mitigate distortions that can result from differences in the rules for accrual of income under U.S. and foreign tax systems. See H.R. Rep. No. 85-775, at 27-28 (1957); Staff of the Joint Committee on Taxation, Summary of the Technical Amendments Bill of 1958 (Part Two) 5 (1958). Even if that were the sole purpose behind section 904(c), however, it would not answer the question whether foreign tax carrybacks cancel the deficiency interest that would be due on any deficiency eliminated by the carryback. The fact that Congress wanted to allow some room for matching foreign tax credits with the recognition of corresponding income under the U.S. tax system does not mean that Congress wanted to allow taxpayers to use foreign tax carrybacks to avoid the normal consequences of tax underpayments in prior years. In fact, section 6611(g), which bars taxpayers from obtaining refunds on overpayments generated by foreign tax carrybacks, is proof that Congress did not regard the matching function of section 904(c) as sufficient to call for treating foreign tax carrybacks as generally retroactive for interest purposes. Moreover, Congress's recent amendment of section 6601(d) to include an explicit requirement that deficiency interest be paid on deficiencies eliminated by foreign tax carrybacks undercuts Fluor's argument that Congress's earlier failure to include foreign tax carrybacks in section 6601(d) was based on a perceived difference between the policy underlying the foreign tax carryover and the policies underlying other carryover provisions.

Carryover provisions all afford benefits to the taxpayer, and they often do so by tempering the distortions that would result from limiting the deduction or credit to a

single taxable year. "Matching" is one way section 904(c) accomplishes that end; another is by spreading the effects of unusually high foreign taxes across an eight-year period, a form of averaging. See Elisabeth A. Owens, The Foreign Tax Credit 279 (1961). But that does not mean that such provisions must be regarded as fully retroactive for purposes of determining interest obligations. The statutory provision at issue in Koppers, for example, was designed to cure distortions in the base period net income that was used to calculate excess profits taxes. Nonetheless, the Supreme Court did not regard the ameliorative purpose of the statute as justifying the creation of an exception to the general rule requiring that interest accrue on tax deficiencies until they are paid. The purposes underlying section 904(c) likewise do not call for giving full retroactive treatment to foreign tax carrybacks.

4

Fluor next contends that the Internal Revenue Service has not previously imposed interest on deficiencies eliminated by the foreign tax credit, and that its failure to do so until now should be regarded as a longstanding administrative recognition that interest is not chargeable in this setting. This is not a case, however, in which the Service is attempting to reverse a position it has long taken in construing a tax statute. So far as the record reflects, the Service did not take a position on this issue until 1992, at which time it took the position it has taken throughout this litigation. We are unwilling to treat as established administrative practice what amounts to no more than a failure to advert to the issue at a policymaking level.

Finally, Fluor argues that Congress's failure to specify a time at which the accrual of interest would terminate is evidence that Congress did not intend to assess interest on deficiencies eliminated by foreign tax carrybacks. It is true that the rule advocated by the government leaves us with the task of determining - without explicit congressional guidance - when the accrual of interest for Fluor's eliminated deficiency should stop running. That, however, is simply a consequence of Congress's having relied on the principles of Seeley Tube and Koppers rather than having legislated specifically on this subject.

The same problem was presented to the Supreme Court when it adopted the approach to interest that it employed in Seeley Tube, and the Court did not regard that problem as persuasive evidence that Congress meant to excuse the payment of interest on deficiencies in cases governed by that decision. We reach the same conclusion in this case.

III

Having decided that Fluor must pay interest on its 1982 tax deficiency, we next address the question of when the accrual of interest stopped running. Fluor argues that if it must pay interest, the interest should have stopped accruing as of the end of the taxable year in which the foreign tax carryover became available, i.e., on October 31, 1984. The government agues that the interest should run until the due date for Fluor's tax return for the year in which the foreign tax carryover became available, i.e., January 15, 1985. On this issue, we agree with Fluor.

In 1958, when the foreign tax carryover statute was enacted, the statute governing interest on deficiencies

eliminated by a net operating loss carryback provided that the accrual of interest would end at the close of the taxable year in which the carryover was generated. See 26 U.S.C. §6601(e) (1958). The Code likewise provided at that time that refund interest on foreign tax carrybacks, as well as refund interest on net operating loss carrybacks, would begin to accrue at the end of the taxable year in which the carryback was generated. See 26 U.S.C. § 6611(f)(g) (1958). In light of those statutory provisions, Congress presumably would have selected the same date for ending the accrual of deficiency interest with respect to foreign tax carrybacks if it had expressly addressed that subject in the 1958 legislation.

Although Congress in 1982 changed the timing rules for interest on carrybacks covered by section 6601(d), see Pub. L. No. 97-248, § 346(c), we decline the government's invitation to treat that legislative change as if it changed the period for calculating interest under the non-statutory deficiency interest rule applicable to foreign tax carryovers. There was no statutory change made in 1982 with respect to the foreign tax carryover, so we cannot attribute to Congress the intention to have the foreign tax carryover timing rules follow the 1982 legislative change in the rules applicable to other carryovers. We therefore direct the Court of Federal Claims on remand to ascertain the accrued interest based on an ending date of October 31, 1984, and to enter judgment premised on that ending date.

REVERSED and REMANDED

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-769T
(Filed: May 24, 1996)

FLUOR CORPORATION AND AFFILIATES,	*	Income taxes; foreign tax credit carryback; elimination of interest on tax underpayment for earlier year.
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

Stanford G. Ross, Washington, D.C., for plaintiff.

William K. Drew, with whom were Assistant Attorney General Loretta C. Argrett and *Mildred L. Seidman,* Washington, D.C., for defendant *David Gustafson,* of counsel.

OPINION

MARGOLIS, *Judge*.

This federal income tax case is before the court on plaintiff's motion for summary judgment and defendant's cross motion for partial summary judgment. The question is whether a foreign tax credit carryback to an earlier tax year which eliminates a tax underpayment for that earlier year also results in an elimination of interest on the underpayment, as plaintiff maintains, or whether plaintiff must pay deficiency interest from the due date of the underpayment-year tax return to the due date of the carryback generating-year tax return, as defendant claims. After careful consideration of the record, and after hearing oral argument, this court finds that no material issue of fact exists and that plaintiff is entitled to judgment as a matter of law. Accordingly, this court grants plaintiff's motion for summary judgment and denies defendant's motion for partial summary judgment.

FACTS

Plaintiff, an affiliated group of corporations with Fluor Corporation as its common parent (Fluor), filed consolidated federal income tax returns. The Internal Revenue Service (IRS) examined Fluor's tax return for the tax year ending October 31, 1982, and determined that there was an underpayment of tax for that year. The underpayment, however, could be reduced by additional foreign tax credits based upon a carryback of foreign taxes paid or accrued during plaintiff's taxable year 1984.

The IRS concluded that Fluor owed interest on the amount of the underpayment satisfied by the foreign tax carryback from the due date of the tax return for the 1982

underpayment year (January 15, 1983) through the due date of the tax return for the 1984 carryback-generating year (January 15, 1985). The IRS computation provided that interest would accrue until the due date of plaintiff's return for tax year 1984 because the 1982 deficiency was eliminated by the carryback of foreign taxes from 1984 to 1982 -- the IRS thus treated the 1982 tax deficiency as "paid" in 1984. (The 1984 carryback was subsequently displaced by a carryback of foreign taxes from 1983 to 1982.)

Fluor contended that no interest was due on the portion of the 1982 tax underpayment which was eliminated by the foreign tax carryback, claiming that the tax relief under the foreign tax carryback was retroactive, extinguishing the deficiency and thus eliminating the interest charges on the deficiency. In effect, Fluor claimed that the foreign taxes carried back from later taxable years and used as credits in earlier years should be treated as taxes paid in the earlier years. In the event that it does not prevail on this issue, plaintiff argues that the interest period should run only to the end of the carryback-generating tax year.

Fluor paid the interest assessed by the IRS with respect to its 1978, 1981, and 1982 tax years on April 15, 1992. On May 19, 1992, Fluor filed claims for refunds equal to the difference between the amount of interest assessed by the IRS and the amount of interest computed by Fluor after making reductions for the foreign tax carrybacks. The IRS disallowed the claims, stating in a December 9, 1993 letter to the plaintiff that the reason for the disallowance was that "[a] clear legislative intent not to apply the use of money principle of *Seeley* has not been established."

Plaintiff filed a complaint with this court on December 17, 1993, seeking refunds of assessed interest with respect to plaintiff's 1978, 1981, and 1982 taxable years of $2,570,674,

$8,717,239, and $3,740,615, respectively, plus statutory interest.

Plaintiff has submitted a settlement offer to defendant with respect to liability and computational issues for tax years 1978 and 1981 based on subsequently determined loss carrybacks from tax year 1984 which eliminated the issue of when foreign tax credits which are carried back are to be taken into account for purposes of computing deficiency interest. If the settlement offer is accepted, then only tax year 1982 will remain in dispute.

The parties subsequently stipulated that: (1) if plaintiff should prevail with respect to the 1982 tax year, the amount of the judgment to be entered in plaintiff's favor is $2,403,756.85 in interest paid, plus statutory interest on this amount of $235,096.43, accrued through April 15, 1992, plus interest from April 15, 1992; (2) if defendant prevails, judgment should be entered in plaintiff's favor in the amount of $30,046.82 in interest paid, plus interest from April 15, 1992; (3) if defendant prevails on the primary issues, but plaintiff prevails on the issue of the appropriate ending date for the computation of restricted interest, then judgment should be entered in plaintiff's favor in the amount of $394,319.21 in interest paid, plus interest from April 15, 1992.

DISCUSSION

Section 6601(a) of the Internal Revenue Code of 1954, as amended (26 U.S.C.) provides, in general, for interest on tax deficiencies:

> General Rule. -- If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment,

> interest on such amount shall be paid for the period from such last date to the date paid.

Section 6601(d), which provides for "restricted interest" when a deficiency is subsequently reduced by a loss or credit carryback, makes no mention of foreign tax carrybacks. The section provides a "use of money" rule for calculating this interest. The taxpayer must pay interest on the deficiency until the filing date of the loss- or credit-generating year:

> If the amount of any tax . . . is reduced by reason of a carryback of a net operating loss or net capital loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss or net capital loss arises. [Same rule for credit carrybacks.]

26 U.S.C. § 6601(d).

In general, taxes paid to foreign governments are deductible under § 164(a). Under § 901, however, taxpayers may elect to claim a credit, instead of a deduction, with respect to foreign taxes upon income and certain other similar types of foreign taxes. Section 904(a) imposes a limitation on the amount of the foreign tax credit that may be claimed under § 901. This limitation is based upon a ratio of the taxpayer's foreign-source taxable income to the taxpayer's total taxable income.

Section 904(c) provides for certain carrybacks and carryforwards of excess foreign taxes where a taxpayer elects to claim a foreign tax credit, but where the amount of the credit that could otherwise be claimed exceeds the limit set

forth in § 904(a). Section 904(c) provides that such excess taxes

> shall be deemed taxes paid or accrued to foreign countries or possessions of the United States in the second preceding taxable year, in the first preceding taxable year, and in the first, second, third, fourth, or fifth succeeding taxable years, in that order . . . . Such amount deemed paid or accrued in any year may be availed of only as a tax credit and not as a deduction and only if the taxpayer for such year chooses to have the benefits of this subpart . . . .

Along with the enactment of § 904(c), authorizing foreign tax carrybacks for purposes of the foreign tax credit, Congress enacted § 6611(g), which imposes restricted interest principles with respect to overpayments caused by credits based on foreign tax carrybacks. Congress did not, however, make any corresponding amendment to §6601 regarding underpayments that are satisfied by foreign tax credits based on foreign tax carrybacks. Although § 6611 provides generally that taxpayers are entitled to interest on overpayments of tax, § 6611(g) provides that if an overpayment of tax results from a carryback of foreign taxes, the taxpayer is not entitled to interest on the overpayment during the restricted interest period ending with the filing date of the carryback-generating year. Section 6611(g) provides that

> if any overpayment of tax results from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been paid or accrued prior to the filing

> date . . . for the taxable year . . . in which such taxes were in fact paid or accrued.

Section 6611(f) provides a similar rule for loss or credit carrybacks:

> if any overpayment of tax . . . results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss or net capital loss arises . . . [same rule for credit carrybacks].

Prior to amendment in 1982, sections 6601(d), 6611(f), and 6611(g) each provided that the restricted interest period ended with the last day of the carryback year. After the 1982 amendment, the restricted interest period ended with "the filing date" for the carryback year.

Plaintiff claims that foreign taxes paid or accrued in a subsequent year and carried back to an earlier year should be treated, for purposes of deficiency interest, the same as foreign taxes paid or accrued in the earlier year. These foreign tax carrybacks would therefore reduce any deficiency in the earlier year upon which interest may be imposed. In the event the court finds that interest is due on the underpayment satisfied by the foreign tax carryback, plaintiff maintains that the interest period should run only to the end of the year in which the foreign taxes carried back were paid.

Plaintiff supports its position by pointing out that nothing in the Code provides for the imposition of deficiency interest in these circumstances. Section 6601(d), providing for the payment of deficiency interest in the loss or credit carryback situations, omits any mention of foreign tax

carrybacks. Further, Section 904(c) provides that such carrybacks are "deemed" paid in the earlier year.

Defendant, on the other hand, maintains that Fluor owes interest on the 1982 tax underpayment eliminated by the foreign tax carryback, and that this interest runs from the due date of the 1982 return until the due date of the tax return for the year in which the carryback was generated.

Defendant contends that, in accordance with Supreme Court opinions interpreting predecessor statutes, § 6601(a) imposes interest on all underpayments of tax, absent a clear legislative expression to the contrary, because a taxpayer who does not pay his tax liability in a timely manner has the use of funds rightfully belonging to the government. Defendant claims that there is no clear legislative expression absolving taxpayers who underpay their taxes from liability for interest if the underpayment is later eliminated by foreign tax credits that are based on foreign tax carrybacks. Further, defendant points out that under § 6611(g), taxpayers are not entitled to interest on refunds from the government of overpayments of tax due to foreign tax carrybacks, so that not imposing, interest on underpayments subsequently satisfied by these carrybacks would penalize taxpayers who timely pay their full tax liabilities and then receive refunds due to a carryback of foreign taxes from a later year.

In *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565 (1950), the Supreme Court addressed the question "whether the interest on a validly assessed deficiency is abated when the deficiency itself is abated by the carryback of. a net operating loss." The Court concluded that the government is entitled to the "use of the money owed" by a taxpayer, absent a clear expression by Congress to the contrary. *Seeley*, 338 U.S. at 566.

Section 292 of the 1939 Code provided for interest at the rate of 6% from the due date of a tax payment. *Id.* Section 122 (b)(1) provided for the carryback of a net operating loss." If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, ..." *Id.* at 564 n.5.

The *Seeley* Court found that "[t]he subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency." *Id.* at 565. The Court reasoned that

> the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period. In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government

Id. at 566 (emphasis added).

The Court addressed the application of the use of money principle to the loss carryback provisions:

> The enactment of the carry-back provision in 1942 did not change this policy of the statute requiring prompt payment. This section was intended to afford taxpayers an opportunity to

> present for tax purposes a realistic, balanced picture of their profits and losses. . . . But there is no indication that Congress intended to encourage taxpayers to cease prompt payment of taxes.

Id. at 566-67.

The Court then elaborated on its concerns that taxpayers who promptly pay their taxes would be penalized if deficiency interest were not assessed against taxpayers who satisfy underpayments with loss carrybacks. The Code prohibited taxpayers who pay their tax and then have an overpayment due to loss carrybacks from claiming interest on the overpayment.

In the present case, plaintiff's interpretation of the Code would penalize taxpayers who timely pay their tax liabilities and then receive refunds due to carrybacks of foreign taxes as compared to taxpayers who do not satisfy tax deficiencies when due, but whose deficiencies are subsequently eliminated by foreign tax carrybacks.

Seeley differs from the present case, however, because § 904(c) of the Code provides that carrybacks of foreign tax "shall be deemed taxes paid or accrued" in the year to which the excess taxes are carried back. The statute at issue in *Seeley* provided that the net operating loss "shall be a net operating loss carryback for" the year to which the net operating loss is carried back. Plaintiff argues that the language of § 904(c) is a "clear legislative expression" that such carrybacks operate to eliminate any tax liability in the earlier year upon which interest may be assessed.

In *United States* v. *Koppers Co.*, 348 U.S. 254, 256 (1955), the Supreme Court found that abatements of excess

profits taxes were not retroactive, so that taxpayers were obligated to pay interest on the taxes until the date of abatement. The Court held that as the statute precluded the payment of interest to the taxpayer on refunds of excess profits taxes overpaid by reason of an abatement,

> [t]his treats the Government as entitled to the use of the abated amounts between the time of their overpayment and that of their abatement. Equity demands a comparable result in the case of underpayments. . . . This is the natural counterpart of the Government's freedom from paying interest on refunded overpayments.

Koppers, 348 U.S. at 267. The Court further found that Seeley "is thoroughly consistent in principle with the above discussion." *Id.* at 270.

The Federal Circuit faced a question similar to that in the present case in *Shriners Hospitals for Crippled Children* v. *United States*, 862 F.2d 1561 (Fed. Cir. 1988). The holding, in *Shriners* resulted in a situation in which late-paying taxpayers were not placed on an equal footing with those who timely paid their tax. The Federal Circuit held that the taxpayer did not owe interest on underpayments of tax, although the statute provided that the IRS was not obligated to pay interest on overpayments of tax.

At issue in *Shriners* was a 1984 amendment to the law affecting split-interest charitable remainder trusts, which provided, in 26 U.S.C. § 2055(e)(3)(F), that if the income beneficiary of an unqualified trust dies before the estate tax is due, the trust can be amended so that it is a qualified charitable remainder trust, and "a deduction shall be allowed for such reformable interest" as if the trust had met the requirements of

a charitable trust on the decedent's death. *Shriners*, 862 F.2d at 1562. This provision was made retroactive to include the period affecting the estate at issue in *Shriners*. *Id.* The legislative history of the statute included a statement that, "'[t]he amended trust is to be treated as a qualified charitable remainder trust not merely for deduction purposes but for all purposes.'" *Id.* at 1563 (citation omitted) (emphasis added). The statute provided in a note to 26 U.S.C. § 2055, however, that the government was prohibited from paying interest on refunded taxes under § 2055(e)(3) in the situation at issue in *Shriners*. *Id.* at 1562.

The Internal Revenue Service disallowed a charitable deduction made by the taxpayer estate in *Shriners* on its final federal tax return in 1979. The IRS assessed a deficiency and interest for late payment of the tax. The estate paid these amounts, and did not challenge the correctness of the decision under the law then in effect. *Id.*

When the law was amended in 1984 to allow the charitable deduction, the estate claimed a refund for the tax and interest paid. The government conceded that the estate was entitled to the return of the tax paid, but refused to refund the interest. *Id.* The estate filed suit in the Claims Court, which dismissed the complaint. Without citing *Seeley*, the Claims Court used similar reasoning, finding that the estate must pay interest on the deficiency because

> Congress indicated no desire to distinguish between an estate which timely paid the full taxes legally due and one that claimed an erroneous deduction and waited for the IRS to 'catch up with it' on audit. . . . To permit the latter taxpayer to recover any portion of the time-value of money completely denied to its more punctual counterpart would, in effect,

> reward the late payment of taxes. The court cannot ascribe to the statute such an unbalanced result in the absence of clear evidence that such was Congress' aim.

Shriners Hospitals for Crippled Children v. *United States*, 14 Cl. Ct. 51, 54 (1987).

The Federal Circuit reversed, finding that although Congress specifically relieved the government of its obligation to pay interest on refunds of overpayments of tax in this situation, the taxpayer did not owe interest for late payment of the tax, because "the congressional intent of reformation for all purposes" requires that the tax be treated as if it were never due. *Shriners*, 862 F.2d 1563. The court distinguished Seeley on the ground that in that case,

> [t]he subsequent change in law did not change Seeley Tube's tax obligation for the year in question; it merely allowed Seeley Tube to carry back subsequent losses, thereby reducing the amount of tax owed.
>
> In contrast, 26 U.S.C. § 2055(e)(3) eliminated the basis of the tax obligation. By reformation of the will, it was as if no tax had ever been due. It would contravene Congress' intent to give retroactive effect to this provision for all purposes, to assess interest on late or underpayment of a tax that was not owed.

Id. at 1564. The Federal Circuit further explained that the estate's "recovery of interest paid on a tax that, by retroactive reformation of the will, was not owed" fulfilled the conditions set forth by the Supreme Court in *Koppers* for a finding that a

taxpayer did not owe interest on an underpayment. The taxpayer must show that the tax relief granted under the statute is "necessarily retroactive, extinguishing the deficiency as of the original due date of the tax and thus eliminating the interest charges . . ." *Id.* at 1563, *quoting Koppers,* 348 U.S. 254, 263. The Federal Circuit also noted that its decision was in accord with *Oxford Orphanage, Inc.* v. *United States,* 775 F.2d 570 (4th Cir. 1985).

In the present case, it is not necessary to look to legislative history, as the Federal Circuit did in *Shriners,* for a clear legislative expression that interest is not to be imposed on underpayments of tax that are later satisfied by foreign tax credits based upon foreign tax carrybacks. The intent of Congress can be discerned from the plain language of the statute. Congress provided in § 904(c) that the carryback of the credit for excess foreign tax paid "shall be deemed taxes paid or accrued"in the earlier year. Under § 904(c), therefore, Fluor's tax obligation for 1982 was changed; it was reduced by the foreign tax carried back which was "deemed" paid in 1982.

The fact that § 6611(g) specifically provides that the taxpayer is not entitled to interest on an overpayment resulting from a carryback of foreign taxes does not change the fact that the carrybacks are otherwise "deemed" paid in the preceding year. The Federal Circuit similarly found in *Shriners* that the "for all purposes" language in the legislative history of the statute at issue in that case was subject to the specific exception delineated in the statute for interest on overpayments.

CONCLUSION

There is a clear legislative expression of intent that, notwithstanding the general rule of § 6601(a), interest is not to

be imposed on underpayments of tax that are later satisfied by foreign tax credits based upon foreign tax carrybacks. The court accordingly grants plaintiff's motion for summary judgment and denies defendant's motion for partial summary judgment. In accordance with the stipulation of the parties, the court finds for the plaintiff for tax year 1982 in the amount of $2,403,756.85 in interest paid, plus statutory interest of $235,096.43 accrued through April 15, 1992, plus interest from April 15, 1992. After tax years 1978 and 1981 are settled with regard to liability and tax computations, the clerk shall enter judgment for the plaintiff for tax year 1982 in accordance with the stipulation of the parties. Each party shall bear its own costs.

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LAWRENCE S. MARGOLIS
Judge, U.S. Court of Federal Claims

May 24, 1996

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS AND OF POSSESSIONS OF UNITED STATES.

(a) Allowance of Credit. If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year....

(b) Amount Allowed. Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

> **(1) Citizens and domestic corporations.** In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United states; . . .

. . . .

SEC. 904. LIMITATION ON CREDIT.

(a) Limitation. The total amount of the credit taken under section 901(a) shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United

States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year. . . .

. . . .

(c) Carryback and Carryover of Excess Tax Paid. Any amount by which all taxes paid or accrued to foreign countries or possessions of the United States for any taxable year for which the taxpayer chooses to have the benefits of this subpart exceed the limitation under subsection (a) shall be deemed taxes paid or accrued to foreign countries or possessions of the United States in the second preceding taxable year, in the first preceding taxable year, and in the first, second, third, fourth, or fifth succeeding taxable years, in that order and to the extent not deemed taxes paid or accrued in a prior taxable year, in the amount by which the limitation under subsection (a) for such preceding or succeeding taxable year exceeds the sum of the taxes paid or accrued to foreign countries or possessions of the United States for such preceding or succeeding taxable year and the amount of taxes for any taxable year earlier than the current taxable year which shall be deemed to have been paid or accrued in such preceding or subsequent taxable year (whether or not the taxpayer chooses to have the benefits of this subpart with respect to such earlier taxable year). Such amount deemed paid or accrued in any year may be availed of only as a tax credit and not as a deduction and only if the taxpayer for such year chooses to have the benefits of this subpart as to taxes paid or accrued for that year to foreign countries or possessions of the United States.

. . . .

SEC. 6601. INTEREST ON UNDERPAYMENT, NONPAYMENT, OR EXTENSIONS OF TIME FOR PAYMENT, OF TAX.

(a) General Rule. If any amount of tax imposed by this title (whether required to be shown on return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

. . . .

(d) Income Tax Reduced by Carryback or Adjustment for Certain Unused Deductions.

(1) Net operating loss or capital loss carryback. If the amount of any tax imposed by subtitle A is reduced by reason of a carryback of a net operating loss or net capital loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss or net capital loss arises.

. . . .

(4) Filing date. For purposes of this subsection, the term "filing date" has the meaning given to such term by section 6611(f)(3)(A).

. . . .

SEC. 6611. INTEREST ON OVERPAYMENTS.

(a) Rate. Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

. . . .

(f) Refund of Income Tax Caused by Carryback or Adjustment of Certain Unused Deductions.

(1) Net operating loss or capital loss carryback. For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss or net capital loss arises.

. . . .

(3) Special rules for paragraphs (a) and (2).

(A) Filing date. For purposes of this subsection, the term "filing date" means the last date prescribed for filing the return of tax imposed by subtitle A for the taxable year (determined without regard to extensions).

. . . .

(g) Refund of Income Tax Caused by Carryback of Foreign Taxes. For purposes of subsection (a), if any overpayment of tax results from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been paid or accrued prior to the filing date (as defined in

subsection (f)(3)) for the taxable year under this subtitle in which such taxes were in fact paid or accrued.

. . . .

TAXPAYER RELIEF ACT OF 1997:

SEC. 1055. INTEREST ON UNDERPAYMENTS NOT REDUCED BY FOREIGN TAX CREDIT CARRYBACKS.

(a) IN GENERAL. Subsection (d) of section 6601 is amended by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively, and by inserting after paragraph (1) the following new paragraph:

> **"(2) FOREIGN TAX CREDIT CARRYBACKS.** If any credit allowed for any taxable year is increased by reason of a carryback of tax paid or accrued to foreign countries or possessions of the United States, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such increase shall not affect the computation of interest under this section for the period ending with the filing date for such subsequent taxable year."

. . . .

(c) EFFECTIVE DATE. The amendments made by this section shall apply to carrybacks arising in taxable

years beginning after the date of the enactment of this Act [August 5, 1997].